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No. 96-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGISTS, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS, DIVISION 1

BRIEF OF THE STATE OF OKLAHOMA AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Does the scope of the sovereign immunity from suit accorded Indian Tribes by Federal common law extend to bar actions brought in State court to recover damages for breach of contracts arising out of commercial activities voluntarily entered into by the Tribe outside of Indian Country?

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INTEREST OF THE STATE OF OKLAHOMA

The Smithsonian Institution's National Museum of the American Indian, which is located in the Alexander Hamilton U.S. Custom House just north of Battery Park in lower Manhattan, currently has on display an exhibit entitled "Creation's Journey: Native American Identity and Belief." The exhibit is the museum's first major effort to re-exam old concepts and come to new understandings of native cultures and peoples—past, present and future. The exhibit contains the following observation about the adaptability of Indian

people and their cultures made by the museum's Assistant Director for Cultural Resources, Clara Sue Kidwell:

> Indians have been trapped in time. Anthropologists of the early 20th century, in trying to define the concepts of culture, froze Indian communities in time as representative of some ideal culture. But Indian people have changed and adapted over time. They have taken things from other cultures and made them part of their own lifestyles.

As the nearly forty federally recognized Indian Tribes in the State of Oklahoma have developed and changed over the years, many have become engaged in a variety of business ventures, and the number of tribal businesses has increased dramatically as the Tribes have become engaged in successful—and at times unsuccessful—commercial enterprises, both inside and outside of Indian Country. This increased economic development by the Tribes has brought with it increased commercial interaction between Tribes and non-Indian parties, and increasingly involved the Tribes in commercial activities outside of Indian Country.

The first-impression issue before the Court today is whether the immunity from suit accorded Indian Tribes by Federal common law extends to tribal business activities engaged in outside of Indian Country. The State has a two-fold interest in the question presented.

First, the State has a strong interest in assuring that all those who enter into commercial transactions within the State—outside of Indian Country—have the courts of the

State available to them to enforce contracts and provide adequate redress for breach of contract.

Second, the State has an interest in the economic development of the federally recognized Indian Tribes that reside within its border, and insuring that Tribes do not become "second class commercial citizens" with whom non-Indian parties are reluctant to deal because of their inability to enforce any contracts entered into between them and the Tribes.

SUMMARY OF ARGUMENT

A.

The issue presented is different from that often presented in disputes between States and Indian Tribes. The issue is not whether the State may enforce its laws with respect to transactions taking place inside Indian Country, but rather, whether a State may exercise jurisdiction over tribal business ventures conducted outside of Indian Country.

The issue presented does not deal with either abrogation or waiver, but rather deals solely with the scope and extent of the immunity from suit which Federal common law accords Indian Tribes. The issue presented is whether such immunity extends to Tribal business activities conducted outside of Indian Country.

B.

The Federal common-law ''patchwork quilt'', the ''backdrop of tribal sovereignty'' that is used to inform the Court's pre-emption analysis, strongly suggests that the immunity from suit accorded Indian Tribes as a matter of common law does not extend to tribal business activities conducted outside of Indian Country. This ''sovereignty backdrop'' recognizes that:

- Tribal activities conducted outside the reservation—outside of Indian Country— present different considerations from those conducted inside Indian Country;

- In the absence of express Federal law to the contrary, Indians going beyond reservation boundaries—beyond Indian Country—are generally subject to non-discriminatory State laws otherwise applicable to all citizens of the State;

- Tribal off-reservation [off Indian Country] businesses are not Federal instrumentalities and thus are not protected by the Federal Government's immunities.

C.

Recent tribal immunity analysis used by this Court, such as in Oklahoma Tax Commission v. Potawatomi Indian Tribe, 489 U.S. 505 (1991), demonstrates that these principles are applicable to tribal immunity issues and further demonstrates that tribal immunity from suit is dependent

upon the tribal activity in question being conducted inside of Indian Country.

In Potawatomi, in deciding whether tribal sovereign immunity was present, this Court put great emphasis on the fact that the tribal property in question was held in trust for the Tribe by the Federal Government and was thus Indian Country. One of the arguments advanced by the Oklahoma Tax Commission in Potawatomi was that since the Potawatomi Tribe's sale of cigarettes did not take place ''on a 'reservation' the sale should be held subject to State law in collection.'' In addressing that issue, this Court did not simply say, as Petitioner argues, that tribal immunity exists regardless of where the tribal activity takes place. Rather, this Court went to great lengths to find—and also relied upon—the fact that the tribal cigarette sales took place within Indian Country, holding that ''the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in John, we find that this trust land is 'validly set aside' and thus qualifies as a reservation for tribal immunity purposes.'' 489 U.S. at 511. (emphasis added)

Both the analysis used by this Court in Potawatomi and the general common-law principles that Tribes conducting business outside of Indian Country are generally subject to State laws are compatible with the position that the Federal common-law immunity enjoyed by Indian Tribes does not extend to tribal business activities conducted outside of Indian Country.

D.

The extension of the immunity from suit accorded Indian Tribes to tribal business activities conducted outside of Indian Country would not only result in injustices to the non-Indian parties who enter into contracts with Indian Tribes when a Tribe breaches a contract, but would also effectively make Indian Tribes "second class commercial citizens," who because of their "off-reservation immunity" would have a difficult time finding non-Indian parties willing to enter into off reservation business ventures with them.

E.

The suggestion that the simple expedient of a Tribe "waiving its immunity" as a means of enabling Tribes to find willing non-Indian parties to deal with them in their off-reservation business ventures is not a workable solution. First, there are serious questions as to how, and to what extent, Indian Tribes may waive their immunity. Second, there is confusion regarding who, in each Tribe, if anyone, is empowered to waive immunity. In the face of these realities, so-called waivers of immunity will not instill the confidence in non-Indian parties that they will be able to enforce their contracts with Indian Tribes.

ARGUMENT

Neither the Constitution Nor the Federal Common-Law "Patchwork Quilt" That Forms the "Backdrop" of Tribal Sovereignty Requires That the Common-Law Immunity From Suit Accorded Indian Tribes be Extended to Tribal Business Ventures Conducted Outside of Indian Country.

Although no longer possessed of the full attributes of sovereignty, Indian tribes remain a "separate people, with the power of regulating their internal and social regulations." United States v. Kagama, 118 U.S. 375, 381-382 (1886). They are "distinct, independent political communities, retaining their original natural rights in matters of self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Worcester v. Georgia, 6 Pet. 515, 559 (1832).

Tribes' sovereign rights and the attributes of sovereignty still retained by them pre-dated the United States Constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Indian Tribes have no constitutional right to retain any attributes of sovereignty; rather, Congress has plenary authority to limit, modify and eliminate the powers of local self-government which the tribes otherwise possess. Id. Thus, Indian Tribes do not possess a Federal Constitutional right to any sovereign attributes, including immunity from suit.

In Rice v. Rehner, 463 U.S. 713, 718 (1983), this Court recognized that while federal treaties and statutes have been

'''consistently construed to reserve the rights of self-government of tribes,' *F. Cohen, Handbook of Federal Indian Law*, 273 (1982 ed.),'' the Court's more recent cases have established a "'trend. . . away from the idea of inherent Indian sovereign as a bar to state jurisdiction and toward reliance on federal pre-emption.'" 463 U.S. at 718, quoting from McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). In applying a pre-emption analysis, this Court employs the tradition of Indian sovereignty as a ''backdrop'' to inform its analysis. Rice v. Rehner, 463 U.S. 713, 718-720 (1983).

The role of tribal sovereignty in this Court's pre-emption analysis ''varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.''' Id., and White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

When the Court does not find a tradition of sovereign immunity, or if the Court determines ''that the balance of state, federal and tribal interest so requires,'' the Court's pre-emption analysis may accord less weight to the ''backdrop'' of tribal sovereignty. Rice v. Rehner, 463 U.S. 713, 720 (1983), See, Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), 154-159, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-151 (1973).

While the ''backdrop'' of tribal sovereignty has long recognized that Indian Tribes are accorded immunity from suit with regard to activities conducted inside Indian Country, the ''backdrop'' has also long recognized that tribal activities conducted outside the Reservation—outside of

Indian Country—present different considerations. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, (1973), this Court, in determining whether tribal commercial activities conducted outside of Indian Country were subject to state taxation, first rejected the Tribe's broad assertions that only the Federal Government had jurisdiction over Indian Tribes.

> At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise ''[w]hether the enterprise is located on or off tribal land.'' Generalizations on this subject have become particularly treacherous.

411 U.S. 145, at 147-148.

Next, this Court recognized that the authority that states possess over Indian activities off-reservation is more extensive than that possessed over on-reservation activities:

> But tribal activities conducted outside the reservation [outside of Indian Country] present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' Organized Village of Kake, supra, 369 U.S., at 75, 82 S. Ct., at 571.

411 U.S. 145 at 148.

Then, holding that when Indians go beyond reservation boundaries, they are, as a matter of Federal common law, generally subject to non-discriminatory state laws, this Court stated:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

411 U.S. 145 at 148-149.

The Court also held that tribal business ventures were not Federal instrumentalities. 411 U.S. 145 at 151.

In short, the "backdrop" of tribal sovereignty recognizes that, in the absence of express Federal law to the contrary, Indians are amenable to the general powers of the State, when they go beyond their Reservation boundaries—beyond Indian Country.

The analysis employed by this Court in Oklahoma Tax Comm'n. v. Potawatomi Indian Tribe, 489 U.S. 505 (1981), demonstrates that this general principle of Indian sovereignty is equally applicable to issues involving an Indian Tribe's immunity from suit. In Potawatomi, in deciding whether sovereign immunity was present, this Court put great emphasis on the fact that the tribal activity in question was conducted on tribal property—conducted in Indian Country. One of the arguments presented by the Oklahoma Tax Commission in Potawatomi was based upon the general principles discussed in Mescalero. The argument made was

that since the Potawatomi Tribe's sale of cigarettes did not take place on a reservation, the sales, under the doctrine of Mescalero, should be held subject to state law and collection.

In responding to this argument, this Court did not rule, as the Tribe and Federal Government argued in this case, that tribal immunity exists regardless of whether the tribal activity took place inside or outside of Indian Country. Rather, this Court found, and also relied upon the fact, that the tribal cigarette sales took place on trust land within Indian Country.

First, this Court noted that neither Mescalero nor any other precedent has ever, as the Tax Commission urged, drawn a distinction between tribal trust land and reservations.

> . . . Neither Mescalero nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In United States v. John, 437 U.S. 634, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"

489 U.S. at 511 (emphasis added).

Then, this Court held that because the property upon which the cigarettes were sold was held in trust for the benefit of the Potawatomi Tribe, the land had been validly set aside for the Tribe and "thus qualified as a reservation for tribal immunity purposes":

> *Mescalero* is not to the contrary; that case involved a ski resort outside of the reservation boundaries operated by the Tribe under a 30-year lease from the Forest Service. We said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S., at 148–149, 36 L.Ed.2d 114, 93 S.Ct. 1267. Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*, we find that this trust land is "validly set apart" and thus qualifies as a reservation for tribal immunity purposes.

489 U.S. at 511 (Emphasis added).

The Potawatomi decision thus demonstrates that in order for tribal sovereign immunity to attach, the tribal activity in question must take place on land validly set aside for the Tribe.

The Oklahoma Court of Appeal's view of the territorial limits of tribal sovereign immunity is consistent with this decision. The Oklahoma opinions do nothing more than hold the Kiowa Tribe subject to the State's non-discriminatory

contract laws, when the Tribe conducts commercial activities outside of Indian Country.

The Extension of the Immunity From Suit Accorded Indian Tribes by Federal Common Law to Tribal Business Activities Engaged in Outside of Indian Country Would Effectively Render Indian Tribes "Second Class Commercial Citizens," as, in Such Circumstance, Tribes Would Have Difficulty Finding Anyone Willing to Risk Their Funds in Unenforceable Obligations. Such a Rule Would Thus Chill Tribal Commercial and Entrepreneurial Businesses.

The Suggestions That the Interest of Both Tribes and Non-Indian Parties Can be Met Through a Tribe's Voluntary Waiver of Its Immunity Prior to Entering Into Business Transactions Outside of Indian Country is not Workable Because:

1. **Often Non-Indian Parties do not Know That the Tribal Business With Which They are Dealing May be Protected by Sovereign Immunity;**

2. **Serious Questions Exist Regarding a Tribe's Power to Waive Immunity, and**

3. **Non-Indian Parties Can Have But Little Confidence in the Validity of an Attempted Waiver of Immunity, as There are Always Questions Regarding Whether the Proper Tribal Entity has Acted, and Whether it has Acted in the Required Manner to Effectively Waive Immunity.**

The extension of immunity to tribal business ventures has, by some courts, been regarded as inequitable, unwise and unfair; in one such case, the district court stated:

> [I]t is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others ... confident that no redress may be had against it as a matter of right.

Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Au., 395 F.Supp. 23, 29 (D. Minn. 1974)(quoting *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575, 587 (S.D. N.Y. 1920)).

As one commentator has observed, one of the fundamental problems with extending sovereign immunity to tribal businesses operating outside of Indian Country is the "informational imbalance between Tribes and non-Tribal entities." Brian C. Lake, Note, THE UNLIMITED SOVEREIGN IMMUNITY OF INDIAN TRIBAL BUSINESSES OPERATING OUTSIDE THE RESERVATION: AN IDEA WHOSE TIME HAS GONE, 1996:1 Columbia Business Law Review, 87, 99-104 (1996). As described by Mr. Lake, this informational imbalance is created "when a non-Indian party does not know that the tribal business with which it is dealing is protected by sovereign immunity. The tribal business is given an unfair concealed advantage over its lenders, insurers, customers, and potential business partners. It can breach its contract at will, and sometimes reap a large windfall from the hapless victim." Id. at 100. Also, *Cf. S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983). There,

a tribal business contracted to purchase $177,000 worth of herbicide, received delivery, then simply refused to pay.

In cases in which non-Indian parties do not know that the tribal business they are dealing with can claim immunity, tribal businesses can choose secretly to retain immunity without suffering any of the adverse consequences normally associated with such a choice. This possibility is made more probable in situations where the non-Indian parties do not even know they are dealing with an Indian Tribe, as when the Tribe has formed a corporation, particularly if the corporation is represented by a non-Indian agent. This informational imbalance, alone, makes the suggestion that a simple waiver of immunity solves all problems a non-workable suggestion.

Tribal waiver of immunity is also not a viable solution, because there exists a serious question as to the effectiveness of any attempt by a Tribe to waive immunity. As was observed in the Handbook of Federal Indian Law, many unanswered questions exist regarding an Indian Tribe's power, if any, to waive its immunity:

> Tribes cannot waive their immunity by contract in matters affecting trust property without secretarial or congressional consent. Whether tribes may waive their immunity without congressional authorization in contracts not related to trust property has not been decided. It is also uncertain if tribes can waive their immunity through their own legislation without congressional consent.

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 325 (1982 ed.) (footnotes omitted).

The third difficulty with the argument that the interest of both sides may be taken care of by a waiver of immunity is the lack of confidence that non-Indian parties have in the effectiveness of any attempted waiver. If waiver were possible, what procedure must each Tribe follow, under its own laws, in order to bring about an effective waiver? Who or what entity in each Tribe would be empowered to act or be required to act?

Such questions are not mere academic questions. For example, in a companion lawsuit, the Kiowa Tribe's Business Committee purchased an aviation business and authorized the Tribe's Bank to use the Tribe's oil and gas severance tax funds to collateralize its interim loan of $200,000.00. In the lawsuit filed to collect the money due on the loan, the Tribe took the position that the Kiowa Business Committee lacked the power to take such action.

Such uncertainties regarding the effectiveness of any tribal waiver of immunity make it difficult for any non-Indian party to have confidence in the effectiveness of an attempted waiver. For this reason, and for the reasons discussed above, the suggestion that a Tribe's waivers of immunity will address the interest of both parties is not a sound suggestion. Given the realities and uncertainties that exist regarding waiver of immunity, attempted waivers will not keep Indian Tribes from becoming "second class commercial citizens," should immunity be extended to tribal business ventures conducted outside of Indian Country.

CONCLUSION

The extension of sovereign immunity to business ventures of Indian Tribes conducted outside of Indian Country will send an unfortunate message to the non-Indian business

community: Do not deal with Indian Tribes because contracts with Indian Tribes are not enforceable. The undesirability of such a message cannot be reduced by offers to waive immunity, because of the many questions that exist regarding the lawfulness and validity of attempted waivers.

Fortunately, this message need never be delivered, as both the Federal common-law "backdrop" of tribal sovereignty and the analysis used by this Court in its prior tribal immunity cases demonstrate that to qualify for tribal sovereign immunity, the Tribal activity in question must be conducted inside of Indian Country.

The holding of the Oklahoma Court of Appeals that tribal sovereign immunity does not extend to business ventures entered into by Indian Tribes outside of Indian Country is consistent with the Federal common-law "backdrop" of sovereign immunity and sovereign immunity analysis used by this Court. Accordingly, the decision of the Oklahoma Court of Appeals should be affirmed.

Respectfully submitted,

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